80-1236

No. _____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC., A NEW YORK CORPORATION; AMERICAN MOTORS CORPORATION, A MARYLAND CORPORATION; CHRYSLER CORPORATION AND GENERAL MOTORS CORPORATION, DELAWARE CORPORATIONS; VOLKSWAGEN OF AMERICA, INC., A NEW JERSEY CORPORATION; DETROIT AUTOMOBILE DEALERS ASSOCIATION, INC., AND MICHIGAN AUTOMOBILE DEALERS ASSOCIATION, INC., MICHIGAN CORPORATIONS, *Petitioners,*

v.

DOUGLAS M. COSTLE, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *Respondent.*

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

When a district court rules in a citizen suit brought under §304(a)(2) of the Clean Air Act that the Environmental Protection Agency failed to perform a nondiscretionary duty to issue two sets of regulations essential to petitioners' compliance with emissions performance warranty regulations and that such failure, coupled with immediate enforcement of the warranty regulations, will cause irreparable injury to petitioners, does §307(b) of the Act deny the court jurisdiction to enjoin enforcement of the warranty regulations until EPA complies with its statutory duty?

PARTIES BELOW

The parties to the proceedings in the courts below are those identified in the caption of the case and, in addition, Ford Motor Company and Ed Bailey, Inc., doing business as Ed Bailey AMC/Jeep. Ford and Bailey have not joined as petitioners in this Court.

STATEMENT REGARDING CORPORATE PETITIONERS PURSUANT TO SUPREME COURT RULE 28.1

The corporate petitioners herein, their parent companies, subsidiaries (except wholly owned subsidiaries), and affiliates are as follows:

A. Motor Vehicle Manufacturers Association of the United States, Inc.

MVMA is a not-for-profit trade association incorporated in New York. It has no parent, subsidiaries, or affiliates. Its members are:

American Motors Corporation
Checker Motors Corporation
Chrysler Corporation
Ford Motor Company Freightliner Corporation
General Motors Corporation
International Harvester Company
Mack Trucks, Inc.
The Nolan Company
PACCAR Inc.
Volkswagen of America, Inc.
Walter Motor Truck Company
White Motor Corporation

B. American Motors Corporation:

Willys Motors Australia Pty., Ltd.
Amnor N.V.
Regie Nationale des Usines Renault
Arab American Vehicles Company
Rambler Motors (AMC) Limited
Vehiculos Automores Mexicanos, S.A.
Jeep de Venezuela, S.A.
Ensambladora Carabobo, C.A.
Jeep Caracas, S.A.
Mahindra & Mahindra, Ltd.
Constructora Venezolan de Vehiculos, C.A.

C. Chrysler Corporation

Chrysler Financial Corporation
Chrysler Credit Corporation

Chrysler Corporation has numerous other subsidiaries which are located in the United States and in foreign countries. The majority have the Chrysler name incorporated therein.

D. General Motors Corporation
United States and Canadian Subsidiaries:

General Motors Acceptance Corporation
Motors Insurance Corporation
General Motors of Canada, Ltd.

General Motors Corporation has numerous other subsidiaries which are located in foreign countries. The majority have the General Motors name incorporated therein.

E. Volkswagen of America, Inc.

Volkswagenwerk Aktiengesellschaft
Vorelco, Inc.
Vorelco of California, Inc.

F. Detroit Automobile Dealers Association, Inc.

DADA has no parent, affiliates or subsidiaries.

G. Michigan Automobile Dealers Association, Inc.

MADA has no parent, affiliates, or other than wholly owned subsidiaries.

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MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC., A NEW YORK CORPORATION; AMERICAN MOTORS CORPORATION, A MARYLAND CORPORATION; CHRYSLER CORPORATION AND GENERAL MOTORS CORPORATION, DELAWARE CORPORATIONS; VOLKSWAGEN OF AMERICA, INC., A NEW JERSEY CORPORATION; DETROIT AUTOMOBILE DEALERS ASSOCIATION, INC., AND MICHIGAN AUTOMOBILE DEALERS ASSOCIATION, INC., MICHIGAN CORPORATIONS, *Petitioners,*

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DOUGLAS M. COSTLE, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *Respondent.*

PETITION FOR WRIT OF CERTIORARI

OPINIONS AND ORDERS BELOW

The opinions and orders of neither the district court nor the court of appeals have been published. A copy of the court of appeals' Order is included in the appendix at App. 13a; copies of the Opinion and Order of the district court are included at App. 1a and App. 9a, respectively.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 28 U.S.C. 1651:

> "§1254. **Courts of appeals; certiorari; appeal; certified questions**
>
> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> "(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case before or after rendition of judgment or decree; . . . ."
>
> "§1651. *Writs*
>
> "(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.
>
> "(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction."

The court of appeals' Order was issued on September 19, 1980. That court denied a timely petition for rehearing on October 23, 1980, App. 21a , the mandate of the court of appeals theretofore having been issued on September 30, 1980, App. 19a.

STATUTES INVOLVED

The pertinent sections of the Clean Air Act involved in this appeal are §207, 42 U.S.C. 7541; §304, 42 U.S.C. 7604; and §307(b), 42 U.S.C. 7607(b). Their texts are set forth verbatim in the appendix at App. 27a, App. 33a and App. 37a.[1]

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[1] Citations in this brief, unless otherwise noted, are to the Clean Air Act, the "Act", as amended. Parallel citations to Title 42 of the United States Code are provided in the Table of Authorities.

CONCISE STATEMENT OF THE CASE

This suit involves the jurisdictional relationship between §304(a)(2), the citizen suit provision of the Clean Air Act, the "Act", and §307(b), the Act's exclusive review provision, as they apply to the Administrator's failure to perform nondiscretionary duties under §207 of the Act.

On May 22, 1980, EPA promulgated, to be effective 60 days later on July 21, 1980, emissions performance warranty regulations which required automobile manufacturers to warrant the performance of the emissions control systems of their light-duty vehicles for their useful lives provided the vehicles are maintained in accordance with written maintenance instructions issued by the manufacturers.[2]

The respondent is required by §207 to issue two other sets of regulations governing maintenance instructions, §207(c)(3), and aftermarket parts certification, §207(a)(2). Petitioners claim, and respondent denies, that respondent has a nondiscretionary duty to promulgate those two regulations before requiring automobile manufacturers to issue emissions performance warranties because the manufacturers' liabilities under the warranties are affected by the maintenance instructions and by the use or non-use of certified replacement parts.

On June 30, 1980, EPA announced that development of proposed maintenance regulations was being "temporarily postponed". 45 Fed. Reg. 44117 (June 30, 1980), App. 39a. Work also was then in progress on pro-

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[2] 45 Fed. Reg. 34829 (May 22, 1980), codified as 40 CFR Part 85, Subpart V (1980). Section 202(d) of the Act establishes that the useful life of a light duty motor vehicle or engine is 5 years or 50,000 miles, whichever first occurs.

posed regulations for certification of aftermarket parts, but those regulations were not promulgated until November 25, 1980, long after the effective date of the warranty regulations and even after the hearings both in the district court and in the Sixth Circuit.[3]

Some of petitioners notified respondent on July 12, 1980, pursuant to §304(b), of his failure to perform non-discretionary duties under the Act. On July 18, 1980, petitioners brought suit in the district court under the citizen suit provision of the Act, §304(a)(2), alleging that, before EPA lawfully can enforce the emissions performance warranty regulations, it is compelled by §207 to promulgate the two other related sets of regulations.[4] Petitioners alleged further that enforcement of the warranty regulations prior to the promulgation of the two missing sets of regulations would cause them irreparable injury. Respondent did not assert as a defense to the action petitioners' inability to comply with the 60 day notice provision of §304(b) before suit normally may be commenced and the district court found that the statutory notice given was reasonable under the circumstances which were created by the respondent. District Court Opinion, App. 2a.

Trial occurred on August 15, 1980, at which time the district court, Judge Anna Diggs Taylor, presiding, ruled: (a) that §207 did require EPA to promulgate the two related sets of regulations, as petitioners contended, before enforcing the performance warranty regulations;

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[3] 45 Fed. Reg. 78448 (November 25, 1980).

[4] Jurisdiction also was asserted under the Mandamus Act, 28 U.S.C. 1361; the Declaratory Judgment Act, 28 U.S.C. 2201 and 2202; and the Administrative Procedure Act, 5 U.S.C. 706. The Sixth Circuit held that the district court had jurisdiction under section 304 of the Clean Air Act. App. 33a.

(b) that EPA had failed to do so; and (c) that under such circumstances, petitioners would be irreparably injured by immediate enforcement of the warranty regulations. App. 4a to 7a. The district court neither ruled upon the validity of the warranty regulations nor the procedures followed by EPA in issuing them, although the Sixth Circuit mistakenly said that it did. On August 27, the district court issued both a declaratory judgment incorporating its August 15 ruling and an injunction enjoining enforcement of the warranty regulations until the model year after promulgation of the missing regulations. App. 9a.

The district court, in issuing its injunctive order, specifically found that:

> "Each of the plaintiffs and the public at large would sustain irreparable injury if this Court were not to stay and enjoin the implementation of defendant's May 22 regulations until the regulations governing maintenance, use, and after market parts certification have been promulgated.
>
> * * *
>
> "It can't be denied, and this Court finds, that this scheme would create irreparable divisions between plaintiff American automobile manufacturers and dealers and their customers, concerning the reliability of plaintiffs' product, and their willingness to stand behind it, whether no instructions on maintenance are issued, or overly stringent instructions are issued, or overly loose instructions are issued. The entire area would be disputed as a result of defendant's failure to act as they were dicected, and not only loss of goodwill but a $10,000 per vehicle penalty for any miscalculation will result, to the manufacturers.
>
> "The manufacturers' present inability to designate any certified after market parts creates the same

> problem. And no battle with the customer could really be won. There would also be irreparable injury in the adoption and later correction of procedures which later might prove unnecessary or improper and there is the incalculable cost thereof, and the incalculability of costs . . . [is] itself irreparable damages, and, again, the loss of market position to be sustained if and when those costs are attempted to be passed on to the American car buyer, the cost of the defendant's behavior." District Court Opinion, App. 5a to 6a.

Instead of issuing a writ of mandamus or mandatory injunction to compel issuance of the maintenance and parts certification regulations, the district court issued a declaratory judgment and an injunction prohibiting enforcement of the performance warranty regulations pending EPA's compliance with the Act, concluding that they would provide sufficient inducement for the agency to perform its statutory duties. District Court Order, App. 10a to 11a.

EPA appealed to the Court of Appeals for the Sixth Circuit and moved for summary reversal or, alternatively, for stay of the injunction pending appeal. The motion was heard on September 11 by Judges Martin, Jones and Peck of the Sixth Circuit. On September 19, an Order was issued vacating the injunction, leaving the declaratory judgment intact, and "transferring the case" to the United States Court of Appeals for the District of Columbia Circuit. Sixth Circuit Order, App. 13a. On December 15, 1980, the latter court disclaimed jurisdiction to review a decision of the district court in the Eastern District of Michigan and transferred the case back to the Sixth Circuit. D.C. Circuit Order, App. 23a. On January 7, 1981, the Sixth Circuit requested briefs from respondent's counsel on the appeal from the district court's order. Sixth Circuit Clerk's letter, App. 25a.

The Sixth Circuit, in its September 19 ruling, held that the district court could "fully and completely grant relief" under §304(a)(2) by ordering EPA to issue the missing regulations, but that " . . . If it is necessary to enjoin the enforcement of the performance warranty regulations or to consider their viability, because the performance warranty regulations are invalid without proper parts certification and maintenance regulations, then such actions must be brought pursuant to Section 307(b)(1) in the Court of Appeals for the District of Columbia. . . ." Sixth Circuit Order, App. 18a. The Sixth Circuit did not review the district court's finding that respondent had failed to perform a nondiscretionary duty nor did it consider any of the factual findings of injury which led the district court to enter its injunctive order. Instead, the Sixth Circuit ruled simply that the injunction had been entered without jurisdiction.

The Sixth Circuit's ruling acknowledged the district court's §304(a)(2) jurisdiction to compel agency action, but held that relief from the irreparable injuries that the agency's failure to act had caused could only be sought in a separate proceeding under §307(b) in the District of Columbia Circuit. Petitioners asked this Court to review that Order which drastically curtails the relief obtainable in a citizen suit to compel an agency to perform its statutory duty whenever it is necessary to enjoin the enforcement of a regulation subject to §307(b) review.[5]

Upon the Sixth Circuit's vacating the injunction, manufacturing petitioners issued emissions performance warranties for their 1981 model year vehicles conditioned, however, upon the outcome of litigation over the warranty regulations. If petitioners ultimately prevail,

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[5] Review of the district court's declaratory judgment is now before the Sixth Circuit and is not a subject of this petition.

the emissions performance warranties will be invalid, although owners of 1981 model year vehicles will continue to be protected by the normal manufacturer's warranty issued to purchasers of new vehicles and by the 5 year/50,000 mile emissions control defect warranty mandated by §207(a) of the Act.

REASONS FOR GRANTING THE WRIT

A number of statutes which provide for comprehensive regulatory agency supervision include district court remedies by which any citizen, without regard for considerations of standing, may compel agencies to perform nondiscretionary duties. Those statutes often also contain exclusive review provisions sharply restricting the courts in which interested parties with standing to do so may seek judicial review of the substantive and procedural validity of regulations promulgated or final agency action taken.[6]

The ruling below, if allowed to stand, will effectively hamstring the efficacy of such citizen suits by depriving the district courts of power to provide effective remedies when, contemporaneous with and as a direct result of an agency's failure to perform nondiscretionary duties, other agency actions or regulations threaten irreparable injury. Such ruling not only defeats Congress' purpose to provide effective citizen suits, but it also undercuts traditional notions of a district court's

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[6] Other federal statutes which authorize citizen suits in the district courts and provide for exclusive jurisdiction for review of regulations or final agency action in the United States Courts of Appeals are: the Federal Water Pollution Control Act, *see* 33 U.S.C. 1365 and 1369; the Outer Continental Shelf Lands Act, *see* 43 U.S.C. 1349; the Noise Control Act, *see* 42 U.S.C. 4911 and 4915; and the Resource Conservation and Recovery Act, *see* 42 of U.S.C. 6972 and 6976.

jurisdiction to grant ancillary relief in resolving a case over which it has subject matter jurisdiction.

No prior decision of this Court has attempted to harmonize the effective reach of citizen suit provisions and exclusive review provisions. However, in *Sierra Club* v. *Ruckelshaus,* 344 F. Supp. 253 (DDC), *aff'd per curiam,* 4 ERC 1815 (DC Cir. 1972), *aff'd by an equally divided Court sub nom. Fri* v. *Sierra Club,* 412 U.S. 541, 93 S. Ct. 2770, 37 L. Ed. 2d 140, *reh. den'd,* 414 U.S. 884, 94 S. Ct. 33, 38 L. Ed. 2d 132 (1973), the Court upheld the power of a district court in a §304 citizen suit to enjoin the EPA Administrator from acting upon regulations he had issued until he performed his nondiscretionary duty to issue further regulations despite the Administrator's argument in the district court that the predecessor to §307 provided plaintiffs with appropriately complete relief and that they should have sued in the court of appeals.

I.

Scope of Citizen Suits Under §304(a)(2)

In §304(a)(2) of the Act, Congress authorized "any person", without regard to amount in controversy, citizenship, standing or damage, to bring suit in the district courts to require the Administrator to perform nondiscretionary duties. Section 304(a)(2) provides, in pertinent part:

> "(a) . . . any person may commence a civil action on his own behalf . . .
>
> * * *
>
> "(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this Act which is not discretionary with the Administrator . . . .

* * *

> "The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties . . . to order the Administrator to perform such act or duty . . . ."

Congress further recognized that injunctive relief properly could be sought in such action. Section 304(d) provides, in pertinent part:

> "(d) . . . The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure."

In §307(b)(1) of the Act, Congress provided that judicial review of nationally applicable regulations promulgated or final action taken by the Administrator could only be brought in the District of Columbia Circuit. Section 307(b)(1) provides, in pertinent part:

> "(b)(1) A petition for review of action of the Administrator in promulgating . . . any . . . nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter may be filed only in the United States Court of Appeals for the District of Columbia. . . ."

The issue presented is whether the district court, in exercising its §304(a)(2) jurisdiction, impermissibly infringed upon the exclusive jurisdiction of the District of Columbia Circuit under §307(b) when it enjoined enforcement of the performance warranty regulations until the respondent promulgates the other two sets of regulations required of him by the Act.

The Sixth Circuit ruled that the district court could have ordered the respondent Administrator to perform nondiscretionary statutory duties. Sixth Circuit Order, App. 18a. *See also Natural Resources Defense Council,*

Inc. v. *Train*, 411 F. Supp. 864 (SDNY), *aff'd*, 545 F.2d 320 (2d Cir. 1976). The Sixth Circuit should have ruled, in addition, that the district court had jurisdiction to grant injunctive relief to protect petitioners from the irreparable injury which the district court found would occur because of the Administrator's failure to perform his nondiscretionary duties before enforcing his performance warranty regulations. *See Sierra Club* v. *Ruckelshaus, supra.*

However, without analysis or even consideration of the irreparable injury found by the district court, the Sixth Circuit ruled that the district court lacked jurisdiction to enjoin enforcement of the performance warranty regulations, mistakenly concluding that the district court's injunction was predicated upon that court's determination that the performance warranty regulations were invalid absent promulgation of parts certification regulations and maintenance regulations. Determination of invalidity of the performance warranty regulations, the Sixth Circuit said, was within the exclusive review jurisdiction of the District of Columbia Circuit pursuant to §307(b). Sixth Circuit Order, App. 18a.

The district court's conclusion, as expressed in its opinion and declaratory judgment, did not include a finding that respondent's emissions performance warranty regulations are invalid for any reason, substantive or procedural, notwithstanding the Sixth Circuit's mistaken belief that it did.[7] The district court's decision has no ef-

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[7] The Sixth Circuit's Order, App. 18a, reveals that the court believed the injunction was issued "because the performance warranty regulations are invalid without proper parts certification and maintenance regulations" and that such relief is obtainable only in a §307(b) action. Nothing in the district court's Opinion or Order substantiates the Sixth Circuit's belief. Nowhere in its Order does

fect upon the *validity* of the warranty regulations' provisions. They remain intact, subject to review by the District of Columbia Circuit under §307(b).[8] The district court's injunction *merely suspended* enforcement of the warranty regulations until the Administrator has fulfilled all of his statutory nondiscretionary duties under the Act.

The Sixth Circuit vacated the district court's injunction on the ground that it constituted impermissible "review" of the warranty regulations' validity, which §307(b) reserves exclusively for the District of Columbia Circuit. If that ruling be correct, §304(a)(2) citizen suits cannot provide complete and effective relief whenever the district court's order must in any way affect a regulation theretofore promulgated or final action taken which is subject to §307(b) review. That result is unsup-

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the Sixth Circuit consider petitioners' and the district court's explanations that the validity of the performance warranty regulations was neither challenged by petitioners nor adjudicated by the district court and that the injunction was ancillary relief to protect petitioners from irreparable harm in the interim before respondent could comply with all of the requirements of §207, as interpreted by the district court. *See* Part II, *infra*.

[8] Some of petitioners have filed a petition for review of the performance warranty regulations under §307(b) in the District of Columbia Circuit, No. 80-1828, but no such review was sought or obtained from the district court in the Eastern District of Michigan. The District of Columbia Circuit review involves a myriad of issues relating to the validity of the performance warranty regulations such as, for example, the inadequacy of the administrative record to support the regulations' provisions, procedural irregularities in their promulgation, inclusion of provisions beyond the scope of the Administrator's statutory authority, and the like. Those are objections to the regulations which clearly require the District of Columbia Circuit to "review" the performance warranty regulations to determine their intrinsic validity.

ported by law and impairs Congress' purpose to provide effective citizen suit remedies under the Clean Air Act and under other statutes with similar provisions. Citizen suits, expressly created to avoid standing problems, are drastically limited by the Sixth Circuit's narrow interpretation of the jurisdictional scope of those special statutory rights to sue.

Few citizens will invoke §304(a)(2) type rights if, at best, only partial relief will be available to them in such suits. The §307(b) remedy is even less available to most citizens precisely because they lack standing or because they seek only to challenge the Administrator's *failure* to perform statutory duties which can be brought *only* in a district court under a citizen suit provision such as §304(a)(2).

In addition, citizens with otherwise valid citizen suit claims may not be aware of other regulations or final actions upon which their suits may impact until long after the limited 60 day period for §307(b) review of such regulations or actions has passed. As Justice Powell stated, concurring in *Adamo Wrecking Co.* v. *United States*, 434 U.S. 275, 290, 98 S. Ct. 566, 575, 54 L. Ed. 2d 538 (1978):

> "The 30-day [now 60-day] limitation on judicial review imposed by the Clean Air Act would afford precariously little time for many affected persons even if some adequate method of notice were afforded. It also is totally unrealistic to assume that more than a fraction of the persons and entities affected by a regulation — especially small contractors scattered across the country — would have knowledge of its promulgation or familiarity with or access to the Federal Register. . . ."

The practical effect of the Sixth Circuit's ruling is virtually to *preclude* any suit by citizens whenever a district court's §304(a)(2) remedy, whether by injunction or otherwise, would have any effect on regulations or final agency actions which are *or were* subject to §307(b) review. Section 307(b) does not so require, nor does any other provision of the Act.

Nothing in the Act limits a district court's authority under §304(a)(2) to grant relief required by the court's interpretation of *the Act's* provisions. Section 307(b) grants courts of appeals exclusive jurisdiction only to review *regulations* promulgated or *final actions* taken under statutory authority. The Sixth Circuit, in reality, extended the breadth of exclusive review under §307(b) to include judicial review of the Act itself.

The substantive content of the warranty regulations and the specific procedures by which they had been promulgated were of no importance in the district court proceedings and played no part therein. The Sixth Circuit deprived petitioners' §304(a)(2) remedy of any meaning when it leap-frogged into §307(b) by concluding, mistakenly, that a regulation which the district court never read, nevertheless, had been subjected to "judicial review" by that court.

The respondent announced he would make the performance warranty regulations effective on the 60th day following their promulgation. It was the impending requirement that automobile manufacturers issue emissions performance warranties before they were apprised of the maintenance and parts certification regulations' provisions, not the specific warranty regulations that had been promulgated, which gave rise to petitioner's §304(a)(2) cause of action. In effect, the respondent "jumped the

gun" by seeking to implement performance warranties before he had fully complied with the statutory scheme designed by Congress in §207. Petitioners theretofore had not been affected by respondent's failure to meet the Act's August 7, 1979 deadline for promulgation of parts certification regulations[9], nor by his delay in promulgating maintenance regulations. They became affected by respondent's failures, however, when he announced he was going to require automobile manufacturers to issue warranties even before the supporting regulations had been promulgated. Petitioners moved promptly under §304(a)(2) to compel promulgation of the supporting regulations before enforcement of the warranty regulations by instituting suit as soon as they could in the district court, the *only* court where such relief could be obtained directly without having to challenge the validity of the performance warranty regulations.

The district court's ruling did not interfere with the legitimate scope of §307(b). As noted in footnote 8, *supra*, the petitioners seeking review under §307(b) are not requesting injunctive relief against enforcement of the warranty regulations pending issuance of the supporting regulations but, rather, are challenging the *validity* of those warranty regulations on substantive and procedural grounds. Nor did the district court's ruling establish an exception to §307(b) which would threaten its intended function. Petitioners established in the district court that the Administrator had failed to per-

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[9] Section 207(a)(2) of the Act required respondent to promulgate those regulations two years after the effective date of the 1977 amendments to the Act. The deadline for promulgation was, therefore, August 7, 1979, rather than August 7, 1977, as stated by the Sixth Circuit. Sixth Circuit Order, App. 15a.

form very significant nondiscretionary statutory duties and that such failures, coupled with immediate enforcement of the warranty regulations, would cause irreparable injury both to a major industry and to the American public as well. That is precisely the type of situation for which a citizen suit was designed to afford prompt and effective relief. Instead, the Sixth Circuit's decision virtually mandates bifurcation of litigation in such circumstances, at least when the 60 day review period had not run. *See Adamo Wrecking*, p. 13, *supra*.

Under the Sixth Circuit's ruling, a citizen may seek only a limited mandamus remedy in the district court and is then without further remedy in that court despite continuing and irreparable injury resulting from the Administrator's failures. To receive full relief in a case like this, the citizen must journey to a distant appellate court for further protection in aid of the district court's ruling. In view of the increasing welter of administrative agency rulings, regulations and actions subject to §307(b) review, *see Harrison* v. *PPG Industries, Inc.*, 446 U.S. 578, 100 S. Ct. 1889, 64 L. Ed. 2d 525 (1980), there will be countless situations in which an order compelling an agency to act has an impact upon regulations theretofore promulgated or action the agency previously has taken. The Sixth Circuit's ruling elevates any such "impact" to the level of §307(b) "review" of such regulations or actions, thereby foreclosing appropriate relief in a §304(a)(2) action. A more effective discouragement of citizen suits hardly can be imagined. Such a result cannot have been in the contemplation of Congress.

Indeed, the bifurcation mandated by the Sixth Circuit's ruling is particularly oppressive in view of the fact that injunctive relief, if permissible only under §307(b), would have had to have been sought in the District of

Columbia Circuit within 60 days of the promulgation of the warranty regulations while, at the same time, the citizen suit under §304(a)(2) proceeded in the district court in Detroit, Michigan. Since the grant of the injunction would depend upon the success, or likelihood thereof, of the proceedings in the district court, the Sixth Circuit's artificial severance of these proceedings results in exquisite timing problems, obvious repetition in submitting proofs, and a virtual death blow to the maintenance of a §304(a)(2) citizen suit.

II.

District Court's Jurisdiction To Grant Ancillary Injunctive Relief

The Sixth Circuit acknowledged that the district court had jurisdiction in a suit under §304(a)(2) to compel EPA's Administrator to issue the maintenance and the parts certification regulations required of him by §207 of the Act. Sixth Circuit Order, App. 18a. Judge Taylor stated in her Order, par. 5, App. 10a to 11a, that she would not issue a writ of mandamus or mandatory injunction compelling respondent to perform his statutory duties because she believed that her declaratory judgment and grant of injunctive relief would induce respondent's compliance with such duties. Judge Taylor was undoubtedly correct in believing that what she did was the essential equivalent of a writ of mandamus.[10]

The injunction, however, was something more than just a practical substitute for a writ of mandamus. Had it not been vacated, it would have protected petitioners,

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[10] *See National Treasury Employees Union* v. *Nixon*, 492 F.2d 587 (DC Cir. 1974), where declaratory relief was provided under mandamus jurisdiction in lieu of the actual writ of mandamus.

as a writ of mandamus could not then have done, from respondent's imposing upon automobile manufacturers a warranty obligation the district court had ruled, in light of the Act's unfulfilled requirements, was both premature and irreparably injurious.[11]

If the district court had jurisdiction to order respondent to issue the maintenance and the parts certification regulations, as the Sixth Circuit concluded, it had jurisdiction to explain its decision, for example, by issuance of its declaratory judgment. *See National Treasury Employees Union* v. *Nixon*, 492 F.2d 587 (DC Cir. 1974). It also had the power to issue an injunction based on such declaration and its findings of irreparable injury. *See* the All Writs Act, 28 U.S.C. 1651, and §2 of the Declaratory Judgment Act, 28 U.S.C. 2202.

If the district court's declaratory judgment, that §207 imposed mandatory duties upon EPA to be performed before the agency could require issuance of warranties, had been issued with a writ of mandamus, it would have accorded petitioners relief only *in futuro* upon EPA's compliance with such a writ. Such orders, however, except for their *res judicata* value, would not effectively have prevented respondent from causing irreparable injury to petitioners who would have been required to continue issuing warranties during the period it would have taken him to comply with such a writ of mandamus. For that reason, the district court determined that its declaratory judgment and an injunction would grant more effective relief to petitioners in the cir-

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[11] Congress expressly contemplated that injunctive relief would be granted in citizen suits under §304. Subsection 304(d), quoted at p. 10, *supra*, provides for requiring a bond or equivalent security when a temporary restraining order or preliminary injunction is sought in any §304 action.

cumstances then existing than would its declaratory judgment and a writ of mandamus.

By denying the district court's right to grant injunctive relief instead of a writ of mandamus, the Sixth Circuit undermined the universally recognized power of a district court to "mould each decree to the necessities of the particular case",[12] and to fashion relief on the principle that the scope of the remedy is determined by the nature and extent of the wrong.[13] While the more recent of the cases cited in footnote 13 all involved the extent of a district court's power to fashion effective relief in school desegregation cases, the underlying principle, that a district court has the power to grant ancillary relief to make effective its determination of a controversy over which it has subject matter jurisdiction, has been recognized and applied generally to other controversies. *E.g., Allee* v. *Medrano*, 416 U.S. 802, 812-814, 94 S. Ct. 2191, 2198-2199, 40 L. Ed. 2d 566, (1974); *Riggs, supra*, 73 U.S. at 187; and *Morrow* v. *District of Columbia*, 417 F. 2d 728, 737 (DC Cir. 1969).[14]

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[12] *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329, 64 S.Ct. 587, 592, 88 L. Ed. 754 (1944).

[13] *Milliken* v. *Bradley*, 418 U.S. 717, 744, 94 S.Ct. 3112, 3127, 41 L.Ed.2d 1069 (1974). *See also Swann* v. *Charlotte-Mecklenberg Board of Education*, 402 U.S. 1, 15, 91 S. Ct. 1267, 1276, 28 L. Ed. 2d 554 (1971); *Brown* v. *Board of Education*, 349 U.S. 294, 300, 75 S. Ct. 753, 756, 99 L. Ed. 1083 (1955); *Riggs* v. *Johnson County*, 73 U.S. 166, 187, 18 L.Ed. 786 (1868).

[14] In *Morrow* at page 732-733, Judge J. Skelly Wright comprehensively examined the issue of the ancillary power of federal courts. In footnote 10 of his opinion, he summarized his analysis:

> ". . . two different types of judicial power are presented by this case. The first is the power of a court to issue *different types of remedies* to effectuate its conceded jurisdiction over some subject matter. . . . The second is the power of a court *to*

The Sixth Circuit simply erred in denying the district court's power to grant ancillary injunctive relief to effectuate its §304(a)(2) jurisdiction. That error, unless corrected, deprives petitioners of effective §304(a)(2) relief which the Sixth Circuit acknowledged the district court had the power to grant, Sixth Circuit Order, App. 17a to 18a, and which the district court believed it was granting. District Court Order, par. 5, App. 10a to 11a.

Petitioners at no time claimed entitlement to injunctive relief except as ancillary to other relief for which there clearly was a jurisdictional basis. If there is a jurisdictional basis for the *principal* relief sought, ancillary relief may be granted at the discretion of the trial court even if it would have no independent jurisdiction to grant such relief. *See Morrow, supra.* The Sixth Circuit isolated the ancillary relief sought, decided there was no jurisdiction to grant ancillary relief alone, and ended its consideration of this matter there. That occurred 1) despite the holding of the district court that it had jurisdiction over the *principal* relief sought (*i.e.*, relief in the nature of mandamus under §304); 2) despite the Sixth Circuit's own recognition of §304(a)(2) jurisdiction in the district court;[15] and 3) despite the specific findings

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assert jurisdiction over a subject matter different from, but related to, a matter properly before the court. . . .

"We note this distinction because some commentors refer to both types of power as 'ancillary jurisdiction.' *See* 1 W. Barron & A. Holtzoff, Federal Practice and Procedure §23 (Wright ed. 1960). We think the term 'ancillary jurisdiction' is more appropriate to the latter power — it connotes the court taking jurisdiction in a matter over which, but for a pending matter, it would have no jurisdiction. The former power is more apprppriately seen as involving the form or style of relief granted by a court regarding a subject matter independently within its jurisdiction." Emphasis in original text.

[15] "The district court can fully and completely grant relief for the failure of the Administrator to issue mandatory regulations pur-

by the district court of irreparable injury, a finding untouched by the Sixth Circuit.

If the district court had such jurisdiction, which nobody contests, then it also had the power to grant ancillary relief by issuing such writs and orders as were necessary to enforce its judgment and protect its jurisdiction. The Sixth Circuit never reached that issue because of its analysis, in isolation, of the ancillary relief granted. Such misapprehension regarding the nature of the relief petitioners sought below was crucial, just as it would be in any case in which a court considers only the jurisdictional basis for ancillary relief and, finding none, rejects the case in chief for which there is jurisdiction.

CONCLUSION

The Sixth Circuit recognized that the district court had jurisdiction under §304(a)(2) to compel respondent to supply the missing regulations, but improperly construed §307(b) to deny to the district court jurisdiction to make its order of compulsion effective. By a strained interpretation of "judicial review" the court of appeals barred the district court from effectively enforcing mandatory duties identifiable from the Act itself.

Such restriction of the district court's jurisdiction is not mandated by the Act; on the contrary, because it has the effect of gutting the citizen suit remedy of §304(a)(2), such restriction frustrates the intent of Congress

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suant to Section 207(a)(2) and Section 207(c)(3) of the Clean Air Act by ordering the Administrator to issue parts certification and maintenance instruction regulations. . . ." Sixth Circuit Order, App. 17a to 18a. Petitioners, of course, do not agree with the Sixth Circuit's belief that a mere order compelling issuance of the missing regulations would constitute adequate relief. *See* discussion at pp. 17-20, *supra*.

to provide for such citizen suits in the district courts. The ruling of the court of appeals also takes from the district courts their power, based on both statute and the common law, to issue the ancillary writs and orders necessary to effectuate relief they have jurisdiction to grant.

This case illustrates the potential for harm, for injustice, which exists in the absence of effective judicial restraint upon the exercise of powers delegated to administrative agencies. District Judge Taylor defined its scope in her opinion and identified accurately its cause in this case:

> "This brings us to the irreparable injury to the American car buying public; to the national interest in clean air on which the Congressional scheme was based; and to the millions of Americans whose livelihood hinges on the survival of the automobile industry. All are seriously and irreparably disserved by the administrator's whimsical failure to meet nondiscretionary duties, while demanding compliance with nonexistent rules. There is no public interest whatsoever served by such a situation." District Court Opinion, App. 6a to 7a.

Judge Taylor's remedial order would have accomplished substantial justice within traditional notions of jurisdictional power, but the Sixth Circuit's Order undoes that. More importantly, it practically immunizes such agency action and inaction as are here involved from any restraint except the agency's own self-restraint.

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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January 21, 1981

PETITIONERS' APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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OPINION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

Civil Action No. 80-72618

UNITED STATES OF AMERICA IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION

MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC., a New York corporation; AMERICAN MOTORS CORPORATION, a Maryland corporation; CHRYSLER CORPORATION, FORD MOTOR COMPANY and GENERAL MOTORS CORPORATION, Delaware corporations; VOLKSWAGEN OF AMERICA, INC., a New Jersey corporation; and ED BAILEY, INC., a Michigan corporation, d/b/a ED BAILLEY AMC/JEEP, *Plaintiffs,*

v.

DOUGLAS M. COSTLE, Administrator, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *Defendant.*

PROCEEDINGS HAD before the HONORABLE ANNA DIGGS TAYLOR, District Judge, United States District Court, at courtroom 228 Federal Building, Detroit, Michigan, on Friday, August 15, 1980, commencing at or about the hour of 2:00 p.m.

APPEARANCES:

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Official Court Reporter
Lena Van Smith

The Court would like to place its findings on the record as it is required to do, either on application for preliminary injunction or in disposing of the lawsuit; and this is the Court's final order, inasmuch as we've consolidated this hearing.

The Court finds that it has jurisdiction of this matter pursuant to the following statutes: 28 USC 1361, which provides original jurisdiction in the district courts in mandamus to compel an officer or agency of the United States to perform a duty owed to plaintiff. The factors held by the case law to justify such a Writ of Mandamus are: that the officer has a plain duty to perform certain acts. That the plaintiff has a plain right to the performance of those acts. That the plaintiff has no other remedy. This Court finds that they all exist in this case as will be discussed.

The Court also has jurisdiction under 28 USC 1331(a) and 1336(a), which provides original federal question jurisdiction. There is no question but that this matter arises under the laws of the United States, specifically the mandates of Congress that defendant promulgate certain regulations under the Clean Air Act.

The Court has jurisdiction under 42 USC 7604(a)2 the citizens or persons suits provision of the Air Pollution Control Act. And the Court will not consider the 60 day notice provision of that act to impose an absolute barrier to this suit. See *Conservation Society of Southern Vermont, Inc. versus Secretary of Transportation, 503 F.2d 927*, a Second Circuit case, and others which were cited aptly in the plaintiff's brief.

The defendant in this suit promulgated the regulations sought here to be stayed on May 22, 1980, precisely 60 days prior to their effective date of July 21, 1980, thereby precluding the possibility of plaintiff giving 60 days notice prior to filing suit. Plaintiffs gave notice on July 11, 1980, and filed suit on July 18, 1980, and this Court finds that such notice was reasonable under the circumstances which were created by the defendant.

The Court finds that the defendant administrator has breached his plain, nondiscretionary, and mandatory duty to plaintiffs and to the general public, as alleged by the plaintiffs. That is, on May 22, 1980, the defendant promulgated certain regulations as he is authorized to do by the Air Pollution Control Act, 42 USC 7541(b).

The regulations require manufacturers to warrant the emission control device or system of every new motor vehicle manufactured in the model year commencing after their effective date of July 21st 1980.

This means that they govern warranties on all vehicles commencing to be manufactured this August, this month, for the 1981 model year. Congress provided that the manufacturers' warranty required by these regulations shall run to ultimate purchasers and shall promise that: If the vehicle or engine is maintained and operated in accordance with instructions which the manufacturer must give in accordance with other regulations, and if aftermarket parts which are certified in accordance with yet other regulations are used in the vehicles, then the manufacturer will bear the cost of and remedy any nonconformity of the vehicle with State or Federal clean air laws which might result in penalties. This responsibility is on the manufacturer for the useful life of the vehicle or engine, which the Court understands is 50,000 miles or five years.And a manufacturer's failure to honor the warranties or the general regulatory scheme will result in a penalty of $10,000 per vehicle.

The law also provides at 42 USC 7541(c)(3)(A) that the manufacturer shall furnish with each new vehicle written instructions for proper maintenance care which shall comply with the maintenance regulations which the defendant administrator shall promulgate. Moreover, the law requires that, in bold-face type on the first page of those instructions, the manufacturer advise consumers that repairs may be made by any establishment using the certified automotive parts which have been provided by administrative regulations.

Clearly Congress intended and has directed that the administrator promulgate regulations to certify parts, and to govern proper maintenance and use, prior to his promulgation of the regulations requiring warranties and instruction books which must be based upon those regulations.

But the administrator has not done so and has created a clear Catch 22, not only for the manufacturers and the dealers for whom any course of action, (other than selling no cars) is equally likely to result in enormous penalties and loss of business, but also for the consumer, who would be buying a controversy, if he buys a car under such administratively-created disorder.

The regulations governing certification of after market parts are required by 42 USC 7541(a)(2). That section states:

> "The Administrator shall promulgate such regulations no later than two years following the date of enactment of this paragraph",

which was enacted August 7, 1977. Those regulations have not yet today been promulgated by defendant administrator.

Regulations for instructions for proper maintenance and operation are required by 42 USC 7541(c)(3), and have not yet even been proposed by the administrator. According to the administrator's own publication in the federal record, indeed, he announced a postponement in June of 1980, his counsel have made many contradictions on the record of that fact; has offered no proof; has maintained that these regulations exist; but they are demonstrably not present in the booklet presented to the Court.

Obviously, Congress intended the administrator to act prior to the manufacturers' instruction books in making these regulations. To construe the language otherwise is to compel the administrator's later regulations possibly to include all terms of all manufacturers' instruction books, and, therefore, delegate the regulatory responsibility to the manufacturers. Such intention will not be construed by this Court.

So the Congress, in mandatory language, has directed that two definitive sets of regulations serve as the basis for the regulations on warranties which the administrator has now promulgated. But he has put the cart before the horse, to the great injury of all concerned and promulgated neither of the two basic sets.

To gloss over these obvious gaps in this promulgation, the administrator has published a preamble to these regulations which states that their full extent will be determined in future rules, and that, in the meanwhile, all maintenance instructions shall be as "reasonable and necessary", but the Congress mandated the administrator in 1977 to specify what is reasonable and necessary. Indeed, the Congress eliminated the previous statutory language of reasonable and necessary in this amendment of 1977; and not intending, obviously, to direct the manufacturers and their customers to fight it out among themselves what is reasonable and necessary.

On the undisputed facts, defendant has failed to perform a nondiscretionary duty, of which plaintiffs are entitled to his performance. This Court is not being asked to review the substance of any regulations, but to mandate the defendant's obedience to Congressional directives that they be promulgated in the proper and intended sequence.

Each of the plaintiffs and the public at large would sustain irreparable injury if this Court were not to stay and enjoin the implementation of defendant's May 22 regulations until the regulations governing maintenance, use, and after market parts certification have been promulgated.

The affidavits attached to the Complaint attest to the irreparable injury to each of the plaintiffs separately, in their particular individual business circumstances, and this Court finds those affidavits credible.

It is unable to credit the representations of the defendant that damages to individuals are one matter but the same damages cumulatively sustained on the opposite side are meaningless.

But there are more universal irreparable damages which would flow from this proposition, if it is not stayed.

It can't be denied, and this Court finds, that this scheme would create irreparable divisions between plaintiff American automobile manufacturers and dealers and their customers, concerning the reliability of plaintiffs' product, and their willingness to stand behind it, whether no instructions on maintenance are issued, or overly stringent instructions are issued, or overly loose instructions are issued. The entire area would be disputed as a result of defendant's failure to act as they were directed, and not only loss of goodwill but a $10,000 per vehicle penalty for any miscalculation will result, to the manufacturers.

The manufacturers' present inability to designate any certified after market parts creates the same problem. And no battle with the customer could really be won. There would also be irreparable injury in the adoption and later correction of procedures which later might prove unnecessary or improper and there is the incalculable cost thereof, and the incalculability of costs in itself irreparable damages, and, again, the loss of market position to be sustained if and when those costs are attempted to be passed on to the American car buyer, the cost of the defendant's behavior.

The manufacturer's only alternative would be the realization of a simple loss for those expenses which could only result in the industry's inability to pursue the innovations which it must, for its own survival and for ours as a society. Supposedly, those interests were those of the administrator, as well.

This brings us to the irreparable injury to the American car buying public; to the national interest in clean air on which the Congressional scheme was based; and to the millions of Americans whose livelihood hinges on the survival of the automobile industry. All are seriously and irreparably disserved by the administrator's whimsical failure to meet nondiscretionary duties, while demanding compliance with

nonexistent rules. There is no public interest whatsoever served by such a situation.

Accordingly, declaratory judgment will enter.

That Congress has directed that defendant may not require plaintiffs to issue emission performance warranties under the Act until after he has previously promulgated maintenance and parts certification regulations which are now required by the Act's 1977 amendments, and in no event may he lawfully require the issuance of warranties, except as to . . . [vehicles] manufactured in the model year beginning after all such regulations have been promulgated.

The effective date of the emissions performance warranty regulations promulgated by the defendant at 45 Federal Register 34829 is hereby stayed, and enforcement of those regulations enjoined until either defendant has promulgated the maintenance and parts certification regulations which Congress has directed; or until further order of this Court, whichever event may first occur.

Please submit an agreed upon order at the earliest possible date, counsel.

Court is in recess.

(End of proceedings at 5:25 P.M.)

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN ENTERING AN INJUNCTION AND A DECLARATORY JUDGMENT

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION

Civil Action No. 80-72618

MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC., a New York corporation; AMERICAN MOTORS CORPORATION, a Maryland corporation; CHRYSLER CORPORATION, FORD MOTOR COMPANY and GENERAL MOTORS CORPORATION, Delaware corporations; VOLKSWAGEN OF AMERICA, INC., a New Jersey corporation; DETROIT AUTOMOBILE DEALERS ASSOCIATION, INC., a Michigan corporation; ED BAILEY, INC., a Michigan corporation, d/b/a ED BAILEY AMC/JEEP; and MICHIGAN AUTOMOBILE DEALERS ASSOCIATION, INC., a Michigan corporation *Plaintiffs*

—VS—

DOUGLAS M. COSTLE, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *Defendant*.

Declaratory Judgment And Injunction

This action came on for trial before the Court on August 15, 1980, the Honorable Anna Diggs Taylor, District Judge, having ordered, pursuant to Fed R Civ P 65(a)(2), that the trial of the action on the merits be advanced and consolidated with the hearing on plaintiffs' application for a preliminary injunction and defendant's motion to dismiss. The issues having been duly tried and a decision having been duly rendered.

The Court does hereby Order, Adjudge and Declare as follows:

1. The findings and conclusions contained in this Court's opinion of August 15, 1980 are incorporated herein.

2. The Court has jurisdiction to hear and determine the matters set forth in plaintiffs' Complaint, and to grant the

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relief therein requested, pursuant to the Mandamus Act, 28 USC 1361; the Declaratory Judgment Act, 28 USC 2201 and 2202, in conjunction with 28 USC 1331(a) and 1337(a); the Administrative Procedure Act, 5 USC 704 *et seq.*, in conjunction with 28 USC 1331(a); and the citizen suit provision contained in section 304 of the Clean Air Act, 42 USC 7604.

3. The Court does hereby determine and declare that:

a) section 207 of the Clean Air Act, 42 USC 7541, imposes a nondiscretionary statutory duty upon defendant to promulgate maintenance and parts certification regulations prior to the model year in which defendant seeks to require plaintiff manufacturers to issue emissions performance warranties under the Act, and

b) defendant has not promulgated the maintenance and parts certification regulations required by the Act, and

c) the Act, therefore, prohibits defendant from requiring plaintiff manufacturers to issue emissions performance warranties applicable to 1981 model year vehicles as he has attempted to do. 45 Fed Reg 34829 et seq. (May 22, 1980).

4. Requiring plaintiff manufacturers to issue an emissions performance warranty at a time when defendant has failed to perform his nondiscretionary statutory duties to promulgate maintenance and parts certification regulations would cause immediate and irreparable injury to plaintiffs and to the public and, therefore, defendant hereby is enjoined from enforcing his emissions performance warranty regulations, 45 Fed Reg 34829, *et seq.* (May 22, 1980), except as to vehicles manufactured in a model year commencing after defendant has promulgated the maintenance and parts certification regulations required by section 207 of the Act, 42 USC 7541.

5. The Court concludes that its Declaratory Judgment and grant of injunctive relief will be sufficient to induce defendant to perform his statutory duties and that it need not,

therefore, issue its writ of mandamus or mandatory injunction ordering that such duties be performed.

ANNA DIGGS TAYLOR
United States District Judge

August 27, 1980

OPINION AND ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT VACATING THE INJUNCTION AND TRANSFERRING THE CASE TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 80-1591

MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC., a New York corporation; AMERICAN MOTORS CORPORATION, a Maryland corporation; CHRYSLER CORPORATION, FORD MOTOR COMPANY and GENERAL MOTORS CORPORATION, Delaware corporations; VOLKSWAGEN OF AMERICA, INC., a New Jersey corporation; DETROIT AUTOMOBILE DEALERS ASSOCIATION, INC., a Michigan corporation, ED BAILEY, INC., a Michigan corporation, d/b/a ED BAILEY AMC/JEEP; and MICHIGAN AUTOMOBILE DEALERS ASSOCIATION, INC., a Michigan corporation,
Plaintiffs-Appellees,

v.

DOUGLAS M. COSTLE, Administrator, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Defendant-Appellant.

Order

BEFORE: MARTIN and JONES, *Circuit Judges,* and PECK, *Senior Circuit Judge*

The Administrator of the United States Environmental Protection Agency (the "Administrator") appeals from a judgment of the Eastern District of Michigan permanently enjoining the enforcement of the Emission Control System Performance Warranty Regulation, 45 Fed. Reg. 34829 (May 22, 1980). Because we hold that Section 307(b)(1) of the Clean Air Act, 42 U.S.C. §7601(b)(1) vests in the United States Court of Appeals for the District of Columbia exclusive

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jurisdiction of petitions to review the validity of the performance warranty regulation, we vacate the district court's injunction and order the transfer of this case to the United States Court of Appeals for the District of Columbia.

I.

The Clean Air Act gives the Administrator the authority to require automobile manufacturers to provide performance warranties on automobile emission parts for certain automobiles once he has determined that certain conditions are met.[1] In Section 207(c)(3), 42 U.S.C. §7541(c)(3), the Clean Air Act requires [2] the Administrator to issue

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[1] The Act provides in relevant part:

Testing methods and procedures

(b) If the Administrator determines that (i) there are available testing methods and procedures to ascertain whether, when in actual use throughout its useful life . . . each vehicle and engine to which regulations under section 7521 of this title apply complies with the emission standards of such regulations, (ii) such methods and procedures are in accordance with good engineering practices, and (iii) *such methods and procedures are reasonably* capable of being correlated with tests conducted *under section* 7525(a)(1) of this title, then---

(1) *he shall establish such methods and procedures by regulation, and*

(2) at such time as he determines that inspection facilities or equipment are available for purposes of carrying out testing methods and procedures established under paragraph (1), *he shall prescribe regulations which shall require manufacturers to warrant the emission control device or system of each new motor vehicle* or new motor vehicle engine to which a regulation under section 7521 of this title applies and which is manufactured in a model years beginning after the Administrator first prescribes . . . 42 U.S.C. §7541(b) (Emphasis added.)

[2] (3)(A) The manufacturer shall furnish with each new motor vehicle or motor vehicle engine written instructions for the proper maintenance and use of the vehicle or engine by the ultimate purchaser and such instructions shall correspond to regulations which the Administrator shall promulgate. The manufacturer shall

"maintenance instruction" regulations which require reference to the "parts certification" regulations[3] of Section 207(a)(2), 42 U.S.C. §7541(a)(2). Section 207(a)(2) provides for the mandatory issuance of regulations on parts certification by August 7, 1977.

II.

The Motor Vehicle Manufacturers Association of America (the "Association") filed a complaint in district court alleging that the Act required the Administrator to promulgate parts certification and maintenance instruction regulations prior to the warranty regulation. The Association sought injunctive and declaratory relief prohibiting the Administrator's enforcement of the warranty regulation. Additionally, the Association sought a writ of mandamus to require the issuance of parts certification regulations. The district court held that the Administrator must issue parts certification and maintenance regulations before he can enforce the performance warranty requirements of Section 207(b) and enjoined enforcement of the performance warranty regulations until the model year after the parts certification and maintenance regulations are issued.

---

provide in boldface type on the first page of the written maintenance instructions notice that maintenance, replacement, or repair of the emission control devices and systems may be performed by any automotive repair establishment or individual using any automotive part which has been certified as provided in subsection (a)(2) of this section. 42 U.S.C. §7541(c)(3).

[3] The Act provides:

(1) In the case of motor vehicle part or motor vehicle engine the manufacturer or rebuilder of such part may certify that use of such part will not result in a failure of the vehicle or engine to comply with emission standards promulgated under section 7521 of this title. Such certification shall be made only under such regulations as may be promulgated by the Administrator to carry out the purposes of subsection (b) of this section. The Administrator *shall* promulgate such regulations no later than two years following August 7, 1977.

42 U.S.C. §7541(a)(2).

The Administrator argues that Section 307(b)(1) of the Clean Air Act of 1977, 42 U.S.C. §7607(b)(1), grants exclusive jurisdiction to the United States Court of Appeals for the District of Columbia. Section 307(b)(1) provides in relevant part:

> A petition for review of the Administrator in promulgating . . . any other nationally applicable regulations promulgated . . . under [the Clean Air Act] . . . may be filed only in United States Court of Appeals for the District of Columbia.

42 U.S.C. §7607(b)(1).

The Administrator argues that the performance warranty regulations promulgated by him in May 1980, 45 Fed. Reg. 34829 *et seq.*, was a national regulation within the ambit of 307(b)(1). *Cf. Lubrizol Corp.* v. *Train*, 547 F.2d 310 (6th Cir. 1976). (The district court does not have jurisdiction under the Administrative Procedure Act, 5 U.S.C. §702 (1970), and 28 U.S.C. §1331 to hear a challenge to regulations requiring the registration of motor vehicle fuels and fuel additives.)

The district court in the instant case found jurisdiction pursuant to the Mandamus Act, 28 U.S.C. §1361; the Declaratory Judgment Act, 28 U.S.C. §§2201 and 2202; the Administrative Procedure Act, 5 U.S.C. §704 *et seq.*, and federal matter jurisdiction pursuant to 28 U.S.C. §1331; and the citizen suit provision of Section 304 of the Clean Air Act, 42 U.S.C. §7604. However, the district court did not address the applicability of Section 307(b)(1) of the Clean Air Act.

III.

Congress limited jurisdiction for review of national regulations promulgated by the Administrator pursuant to the Clean Air Act to the Court of Appeals for the District of Columbia. The Association argues that the instant action is not for review of the Administrator's issuance of performance warranty regulations. We hold that the action in the district court was an attempt to review the agency's issuance of

performance warranty regulations, and that this case should be transferred to the Court of Appeals for the District of Columbia.

The Association's argument in support of the district court's injunction has two parts, first that Section 304 of the Clean Air Act[4] permits:

> any person to commence a civil action . . . against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under . . . [the Clean Air Act] which is *not discretionary* with the Administrator. . . . District Courts shall have jurisdiction . . . to order the Administrator to perform such act or duty. (Emphasis added.)

Thus, the Association argues that Section 304 confers jurisdiction upon the district court. The Association also argues that once the district court has jurisdiction to order the Administrator to perform a nondiscretionary duty (pursuant to Section 304) the court must be allowed to fully effectuate the rights of the Association by enjoining enforcement of the performance warranty regulations. These arguments confuse the issue. The district court reviewed the performance warranty regulations when it decided that the parts certification and maintenance regulations were necessary preceding conditions for the issuance of the performance warranty regulations. It is that review or any other review of the regulation which is barred by Section 307(b)(1).

The district court can fully and completely grant relief for the failure of the Administrator to issue mandatory

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[4] Plaintiff's arguments are strongest about Section 304 of the Clean Air Act. The other alleged grounds for jurisdiction found by the district court suffer from the same disabilities which afflict the claims of Section 304. Nothing in the Mandamus Act, Declaratory Judgment Act or the federal issue jurisdiction gives the district court the right to override the explicit grant of jurisdiction in Section 307(b)(1). Thus, under none of these jurisdictional grounds may the district court review the procedures used to issue the performance warranty regulation.

regulations pursuant to Section 207(a)(2) and Section 207(c)(3) of the Clean Air Act by ordering the Administrator to issue parts certification and maintenance instruction regulations. If it is necessary to enjoin the enforcement of the performance warranty regulations or to consider their viability, because the performance warranty regulations are invalid without proper parts certification and maintenance regulations, then such actions must be brought pursuant to Section 307(b)(1) in the Court of Appeals for the District of Columbia. This view most appropriately effectuates the purpose of the Act. *Lubrizol Corp.* v. *Train*, 547 F.2d 310 (6th Cir. 1976).

Accordingly, we hold the district court lacked jurisdiction to enjoin enforcement of the performance warranty regulations. The district court's order enjoining enforcement of the performance warranty regulation is vacated, and the case is transferred to the United States Court of Appeals for the District of Columbia. The mandate shall issue five days after this order is filed with the Clerk of this Court.

ENTERED BY ORDER OF THE COURT

Clerk

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT ISSUING ITS MANDATE

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Misc. No. 80-1591, 80-1604

MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC., a New York corporation; AMERICAN MOTORS CORPORATION, a Maryland corporation; CHRYSLER CORPORATION, FORD MOTOR COMPANY and GENERAL MOTORS CORPORATION, Delaware corporations; VOLKSWAGEN OF AMERICA, INC., a New Jersey corporation; DETROIT AUTOMOBILE DEALERS ASSOCIATION, INC., a Michigan corporation, ED BAILEY, INC., a Michigan corporation, d/b/a ED BAILEY AMC/JEEP; and MICHIGAN AUTOMOBILE DEALERS ASSOCIATION, INC., a Michigan corporation, *Plaintiff-Appellees,*

v.

DOUGLAS M. COSTLE, Administrator, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *Defendant-Appellant.*

Order

BEFORE: MARTIN and JONES, Circuit Judges, and PECK, Senior Circuit Judge

The mandate shall issue on September 30, 1980.

IT IS SO ORDERED.

ENTERED BY ORDER OF THE COURT

Clerk

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DENYING PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 80-1591, 80-1604

MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC., a New York corporation; AMERICAN MOTORS CORPORATION, a Maryland corporation; CHRYSLER CORPORATION, FORD MOTOR COMPANY and GENERAL MOTORS CORPORATION, Delaware corporations; VOLKSWAGEN OF AMERICA, INC., a New Jersey corporation; DETROIT AUTOMOBILE DEALERS ASSOCIATION, INC., a Michigan corporation; ED BAILEY, INC., a Michigan corporation, d/b/a ED BAILEY AMC/JEEP; and MICHIGAN AUTOMOBILE DEALERS ASSOCIATION, INC., a Michigan corporation,
Plaintiffs-Appellees,

v.

DOUGLAS M. COSTLE, Administrator, United States Environmental Protection Agency, *Defendant-Appellant.*

Order

BEFORE: MARTIN and JONES, Circuit Judges, and PECK, Senior Circuit Judge

The Court not having voted in favor of a rehearing en banc, the petition for rehearing heretofore filed by the Plaintiffs-appellees has been referred to the panel which heard the appeal.

The Court concludes that the issues raised in the petition for rehearing were fully considered upon the original submission and decision of the appeal. The petition for

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rehearing is, therefore, denied. Appellee's motions for recall of the mandate and for oral argument are also denied.

IT IS SO ORDERED.

ENTERED BY ORDER OF THE COURT

Clerk

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT RETURNING THE CASE TO THE SIXTH CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1980

No. 80-2467

MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC., *et al.*,

v.

DOUGLAS M. COSTLE, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY, *Appellant.*

BEFORE ROBINSON, MACKINNON and WALD, Circuit Judges

Order

Two cases, Nos. 80-1591 and 80-1604, having been transferred to this Court by the United States Court of Appeals for the Sixth Circuit, and it appearing that each is an appeal from a judgment of the United States District Court for the Eastern District of Michigan, and this Court lacking jurisdiction to consider an appeal from an action by any district court other than the United States District Court for the District of Columbia, see *Preston Corp.* v. *Raese*, 335 F.2d 827, 828 (4th Cir. 1964), it is

ORDERED by this Court that the record and certificate of record in Sixth Circuit Nos. 80-1591 and 80-1604 be physically transmitted and transferred to the Clerk of the United States

Court of Appeals for the Sixth Circuit for appropriate disposition by that Court.

Per Curiam
For the Court
GEORGE A. FISHER
George A. Fisher
Clerk

Circuit Judge WALD did not participate in the foregoing order.

LETTER FROM THE CLERK, UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DIRECTING APPELLANT TO FILE HIS BRIEF

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT
U.S. Post Office & Courthouse Building
Cincinnati, Ohio 45202

January 7, 1981

Mr. Michael A. McCord
Land and Natural Resources Division
Appellate Section
U.S. Department of Justice
Washington, D.C. 20530

Re: Case No. 80-1591 — Motor Vehicle Manufacturers Association of the United States et al., Plaintiffs-Appellees, vs. Douglas M. Costle, Defendant-Appellant, District Court No. 80-72618

Dear Mr. McCord:

Pursuant to the order from the U.S. Court of Appeals for the District of Columbia Circuit the above-styled case has been transferred to the Sixth Circuit Court of Appeals for disposition. Accordingly, we have today filed the record and have reopened the appeal as 80-1591 in this Court.

Twenty-five copies of your brief and ten copies of the joint appendix are required to be filed within forty (40) days from today. See Rules 31-32, FRAP, and Rule 12, Sixth Circuit Rules. Two additional copies of your brief and one copy of the appendix should be served on opposing counsel. Proof of service in accordance with Rule 25(d), FRAP, should accompany the submission of your briefs to this Court.

May we direct your attention to the enclosed outline regarding the filing of documents in this Court and the specific rules which regulate their preparation and submission.

The enclosed entry of appearance form should be completed and returned to this office. Please include your typed name, office address and phone number.

Very truly yours,

JOHN P. HEHMAN, CLERK

By _____

RUTH M. KELLY

Deputy Clerk

SECTION 207(a), (b) and (c) OF THE CLEAN AIR ACT, 42 USC 7451(a), (b) and (c).

Compliance By Vehicles And Engines In Actual Use

Sec. 207. (a)(1) Effective with respect to vehicles and engines manufactured in model years beginning more than 60 days after the date of the enactment of the Clean Air Amendments of 1970, the manufacturer of each new motor vehicle and new motor vehicle engine shall warrant to the ultimate purchaser and each subsequent purchaser that such vehicle or engine is (A) designed, built, and equipped so as to conform at the time of sale with applicable regulations under section 202, and (B) free from defects in materials and workmanship which cause such vehicle or engine to fail to conform with applicable regulations for its useful life (as determined under sec. 202 (d)).

(2) In the case of a motor vehicle part or motor vehicle engine part, the manufacturer or rebuilder of such part may certify that use of such part will not result in a failure of the vehicle or engine to comply with emission standards promulgated under section 202. Such certification shall be made only under such regulations as may be promulgated by the Administrator to carry out the purposes of subsection (b). The Administrator shall promulgate such regulations no later than two years following the date of the enactment of this paragraph.

(3) The cost of any part, device, or component of any light-duty vehicle that is designed for emission control and which in the instructions issued pursuant to subsection (c) (3) of this section is scheduled for replacement during the useful life of the vehicle in order to maintain compliance with reglations [sic] under section 202 of this Act, the failure of which shall not interfere with the normal performance of the vehicle, and the expected retail price of which, including installation costs, is greater than 2 percent of the suggested retail price of such vehicle, shall be borne or reimbursed at the time of replacement by the vehicle manufacturer and such

replacement shall be provided without cost to the ultimate purchaser, subsequent purchaser, or dealer. The term "designed for emission control" as used in the preceding sentence means a catalytic converter, thermal reactor, or other component installed on or in a vehicle for the sole or primary purpose of reducing vehicle emissions (not including those vehicle components which were in general use prior to model year 1968 and the primary function of which is not related to emission control).

(b) If the Administrator determines that (i) there are available testing methods and procedures to ascertain whether, when in actual use throughout its useful life (as determined under section 202 (d)), each vehicle and engine to which regulations under section 202 apply complies with the emission standards of such regulations, (ii) such methods and procedures are in accordance with good engineering practices, and (iii) such methods and procedures are reasonably capable of being correlated with tests conducted under section 206 (a) (1), then —

(1) he shall establish such methods and procedures by regulation, and

(2) at such time as he determines that inspection facilities or equipment are available for purposes of carrying out testing methods and procedures established under paragraph (1), he shall prescribe regulations which shall require manufacturers to warrant the emission control device or system of each new motor vehicle or new motor vehicle engine to which a regulation under section 202 applies and which is manufactured in a model year beginning after the Administrator first prescribes warranty regulations under this paragraph. The warranty under such regulations shall run to the ultimate purchaser and each subsequent purchaser and shall provide that if —

(A) the vehicle or engine is maintained and operated in accordance with instructions under subsection (c) (3),

(B) it fails to conform at any time during its useful life (as determined under section 202 (d)) to the regulations prescribed under section 202, and

(C) such nonconformity results in the ultimate purchaser (or any subsequent purchaser) of such vehicle or engine having to bear any penalty or other sanction (including the denial of the right to use such vehicle or engine) under State or Federal law,

then such manufacturer shall remedy such nonconformity under such warranty with the cost thereof to be borne by the manufacturer. No such warranty shall be invalid on the basis of any part used in the maintenance or repair of a vehicle or engine if such part was certified as provided under subsection (a) (2). For purposes of the warranty under this subsection, for the period after twenty-four months or twenty-four thousand miles (whichever first occurs) the term "emission control device or system" means a catalytic converter, thermal reactor, or other component installed on or in a vehicle for the sole or primary purpose of reducing vehicle emissions. Such terms shall not include those vehicle components which were in general use prior to model year 1968.

(c) Effective with respect to vehicles and engines manufactured during model years beginning more than 60 days after the date of enactment of the Clean Air Amendments of 1970 —

(1) If the Administrator determines that a substantial number of any class or category of vehicles or engines, although properly maintained and used, do not conform to the regulations prescribed under section 202, when in actual use throughout their useful life (as determined under section 202 (d)), he shall immediately notify the manufacturer thereof of such nonconformity, and he shall require the manufacturer to submit a plan for

remedying the nonconformity of the vehicles or engines with respect to which such notification is given. The plan shall provide that the nonconformity of any such vehicles or engines which are properly used and maintained will be remedied at the expense of the manufacturer. If the manufacturer disagrees with such determination of nonconformity and so advises the Administrator, the Administrator shall afford the manufacturer and other interested persons an opportunity to present their views and evidence in support thereof at a public hearing. Unless, as a result of such hearing the Administrator withdraws such determination of nonconformity, he shall, within 60 days after the completion of such hearing, order the manufacturer to provide prompt notification of such nonconformity in accordance with paragraph (2).

(2) Any notification required by paragraph (1) with respect to any class or category of vehicles or engines shall be given to dealers, ultimate purchasers, and subsequent purchasers (if known) in such manner and containing such information as the Administrator may be [sic] regulations require.

(3)(A) The manufacturer shall furnish with each new motor vehicle or motor vehicle engine written instructions for the proper maintenance and use of the vehicle or engine by the ultimate purchaser and such instructions shall correspond to regulations which the Administrator shall promulgate. The manufacturer shall provide in boldface type on the first page of the written maintenance instructions notice that maintenance, replacement, or repair of the emission control devices and systems may be performed by any automotive repair establishment or individual using any automotive part which has been certified as provided in subsection (a) (2).

(B) The instruction under subparagraph (A) of this paragraph shall not include any condition on the ultimate purchaser's using, in connection with such vehicle or engine,

any component or service (other than a component or service provided without charge under the terms of the purchase agreement) which is identified by brand, trade, or corporate name; or directly or indirectly distinguishing between service performed by the franchised dealers of such manufacturer or any other service establishments with which such manufacturer has a commercial relationship, and service performed by independent automotive repair facilities with which such manufacturer has no commercial realtionship; except that the prohibition of this subsection may be waived by the Administrator if —

(i) the manufacturer satisfies the Administrator that the vehicle or engine will function properly only if the component or service so identified is used in connection with such vehicle or engine, and

(ii) the Administrator finds that such a waiver is in the public interest.

(C) In addition, the manufacturer shall indicate by means of a label or tag permanently affixed to such vehicle or engine that such vehicle or engine is covered by a certificate of conformity issued for the purpose of assuring achievement of emissions standards prescribed under section 202 of this Act. Such label or tag shall contain such other information relating to control of motor vehicle emissions as the Administrator shall prescribe by regulation.

SECTION 304 OF THE CLEAN AIR ACT, 42 USC 7604

Citizen Suits

Sec. 304. (a) Except as provided in subsection (b), any person may commence a civil action on his own behalf —

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to be in violation of (A) an emission standard or limitation under this Act or (B) an order issued by the Administrator or a State with respect to such a standard or limitation,

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this Act which is not discretionary with the Administrator, or

(3) against any person who proposes to construct or constructs any new or modified major emitting facility without a permit required under part C of title I (relating to significant deterioration of air quality) or part D of title I (relating to nonattainment) or who is alleged to be in violation of any condition of such permit.

The district courts shall have jurisdistion, without regard to the amount in controversy or the citizenship of the parties, to enforce such an emission standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be.

(b) No action may be commenced —

(1) under subsection (a) (1) —

(A) prior to 60 days after the plaintiff has given notice of the violation (i) to the Administrator, (ii) to the State in which the violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or

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(B) if the Administrator or State has commenced and is diligently prosecuting a civil action in a court of the United States or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any person may intervene as a matter of right.

(2) under subsection (a) (2) prior to 60 days after the plaintiff has given notice of such action to the Administrator,

except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of section 112(c) (1) (B) or an order issued by the Administrator pursuant to section 113(a). Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation.

(c) (1) Any action respecting a violation by a stationary source of an emission standard or limitation or an order respecting such standard or limitation may be brought only in the judicial district in which such source is located.

(2) In such action under this section, the Administrator, if not a party, may intervene as a matter of right.

(d) The court, in issuing any final order in any action brought pursuant to subsection (a) of this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

(e) Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief (including relief against the Administrator or a State agency). Nothing in this section or in any other law of the United States shall be

construed to prohibit, exclude, or restrict any State, local, or interstate authority from —

(1) bringing any enforcement action or obtaining any judicial remedy or sanction in any State or [sic] local court, or

(2) bringing any administrative enforcement action or obtaining any administrative remedy or sanction in any State or local administrative agency, department or instrumentality,

against the United States, any department, agency, or instrumentality thereof, or any officer, agent, or employee thereof under State or local law respecting control and abatement of air pollution. For provisions requiring compliance by the United States, departments, agencies, instrumentalities, officers, agents, and employees in the same manner as nongovernmental entities, see section 118.

(f) For purposes of this section, the term "emission standard or limitation under this Act" means —

(1) a schedule or timetable of compliance, emission limitation, standard of performance or emission standard,

(2) a control or prohibition respecting a motor vehicle fuel or fuel additive, which is in effect under this Act (including a requirement applicable by reason of section 118) or under an applicable implementation plan, or

(3) any condition or requirement of a permit under part C of title I (relating to significant deterioration of air quality) or part D of title I (relating to nonattainment), any condition or requirement of section 113(d) (relating to certain enforcement orders), section 119 (relating to primary nonferrous smelter orders), any condition or requirement under an applicable implementation plan relating to transportation control measures, air quality maintenance plans, vehicle inspection and maintenance programs or vapor recovery

requirements, section 211 (e) and (f) (relating to fuels and fuel additives), section 169A (relating to visibility protection), any condition or requirement under part B of title I (relating to ozone protection), or any requirement under section 111 or 112 (without regard to whether such requirement is expressed as an emission standard or otherwise).

SECTION 307(b) OF THE CLEAN AIR ACT, 42 USC 7607(b)

General Provisions Relating To Administrative Proceedings And Judicial Review

Sec. 307.

(b)(1) A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard or requirement under section 112, any standard of performance or requirement under section 111,[10] any standard under section 202 (other than a standard required to be prescribed under section 202(b) (1)), any determination under section 202(b)(5), any control or prohibition under section 211, any standard under section 231, any rule issued under section 113, 119, or under section 120, or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this Act may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 110 or section 111(d), any order under section 111(j), under section 112(c), under section 113(d), under section 119, or under section 120, or his action under section 119 (c)(2) (A), (B), or (C) (as in effect before the date of enactment of the Clean Air Act Amendments of 1977) or under regulations thereunder, or any other final action of the Administrator under this Act (including any denial or disapproval by the Administrator under title I) which is local or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit. Notwithstanding the preceding sentence a petition for review of any action referred to in such sentence may be filed only in the United States Court of Appeals for the District of Columbia if such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination. Any

petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise.

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement.

NOTICE OF STATUS OF MAINTENANCE REGULATIONS, 45 FED. REG. 44117 (JUNE 30, 1980)

Allowable Maintenance for Light Duty Vehicles (SAN No 1597)

A Description The Clear Air Act requires that automobile manufacturers furnish to the purchaser written instructions for proper use and maintenance of new motor vehicles and engines. This regulation will determine the content of those instructions on the basis of maintenance which is likely to be performed and which is necessary. The Agency has temporarily postponed the schedule for completion of this regulation.

B Classification Routine

C Statutory Authority CAA 207(c)(3). 42 USC 7541(c)(3)

D CFR Change 40 CFR 86

Merill Korth
EPA
Ann Arbor, MI 48105
FTS 8-374-8299
Comm 313-668-4208

Office-Supreme Court
FILED
MAR 30 198
ALEXANDER L. STEVAS
CLERK

No. 80-1236

In the Supreme Court of the United States

OCTOBER TERM, 1980

MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC., ET AL., PETITIONERS

v.

ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

ANTHONY C. LIOTTA
Acting Assistant Attorney General

DIRK D. SNEL
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Washington, D.C. 20530
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QUESTION PRESENTED

Whether a federal district court, in a "citizen suit" brought under Section 304(a) of the Clean Air Act, has jurisdiction to enjoin the enforcement of nationally applicable regulations promulgated under that Act by the Administrator of the Environmental Protection Agency, when Section 307(b)(1) of the Act provides that a petition for review of such regulations shall be filed "only" in the United States Court of Appeals for the District of Columbia Circuit.

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1236

MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC., ET AL., PETITIONERS

v.

ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 13a-18a) is not reported. The opinion of the district court (Pet. App. 1a-7a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on September 19, 1980. Rehearing was denied on October 23, 1980 (Pet. App. 21a-22a). The petition for a writ of certiorari was filed on January 21, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Sections 207, 304, and 307(b) of the Clean Air Act, 42 U.S.C. (Supp. III) 7541, 7604, 7607(b), are set forth in the petition (Pet. App. 27a-38a).

STATEMENT

1. Sections 202-216 of the Clean Air Act, 42 U.S.C. (Supp. III) 7521-7550, establish a scheme for the regulation of emissions from new motor vehicles. Section 202 empowers the Administrator of the Environmental Protection Agency ("the Administrator" or "EPA") to prescribe standards limiting the emission of certain air pollutants from new motor vehicles. 42 U.S.C. (Supp. III) 7521.

As one means of ensuring that motor vehicles maintain compliance with EPA's emission standards throughout their useful lives, Section 207(b) of the Act requires that vehicle manufacturers provide a performance warranty. 42 U.S.C. (Supp. III) 7541(b). Congress first enacted this warranty provision as part of the Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676, 1696; it was amended by Section 209(a) and (c) of the Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685, 756. The manufacturer's performance warranty comes into play if a vehicle fails a state emission inspection and maintenance ("I/M") test at any time during the vehicle's useful life. If the vehicle owner is subject to sanction or penalty under state law for the failure of his vehicle to pass the test, then under the performance warranty, the automobile manufacturer must remedy the nonconformity at its expense, provided the owner has complied with the manufacturer's instructions for proper maintenance and use of the vehicle.

Section 207(b)(1) required the Administrator to issue regulations implementing the performance warranty, after making two sets of findings. These findings relate only to the availability of testing methods and procedures for use in the state I/M programs and the availability of facilities for conducting the state tests.

In 1977 Congress enacted several provisions designed to offset any potential anticompetitive effects associated with the warranty. Among other things, these provisions required

creation of a voluntary parts certification program, through which independent parts manufacturers could certify that use of their parts would not invalidate the warranty.[1] Sections 207(a)(2) and 207(b), 42 U.S.C. (Supp. III) 7541(a)(2) and 7541(b). Implementation of the parts certification program was not made a prerequisite to the promulgation of the warranty regulations.

The 1977 Amendments also provided the Administrator with additional authority to regulate the manufacturers' instructions for maintenance and use. Prior to the 1977 Amendments, Section 207(c)(3) of the Act required vehicle manufacturers to furnish purchasers with "such written instructions for the maintenance and use of the vehicle or engine by the ultimate purchaser as may be reasonable and necessary to assure the proper functioning of emission control devices and systems." 42 U.S.C. 1857f-5a(c)(3).[2] The 1977 Amendments replaced the "reasonable and necessary" language with a requirement that the maintenance and use instructions simply "correspond to regulations which the Administrator shall promulgate." Section 207(c)(3), 42 U.S.C. (Supp. III) 7541(c)(3).

2. The Administrator made all the necessary findings relating to the testing methods and procedures for the state I/M tests (45 Fed. Reg. 34802 (1980)), and all necessary findings concerning the availability of facilities and equipment for conducting such tests (*id.* at 34830). Under the Act, therefore, the Administrator was required to promulgate the warranty regulations, which he did on May 22, 1980. 45

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[1]See S. Rep. No. 95-127, 95th Cong., 1st Sess. 81, 82 (1977).

[2]Pursuant to that provision, the manufacturers submitted proposed instructions to the Administrator; the Administrator evaluated the proposed maintenance instructions and advised the manufacturers whether they satisfied the "reasonable and necessary" requirement. 40 C.F.R. 86.077-39 (1976).

Fed. Reg. 34829 (1980). The warranty took effect with the 1981 model year, the model year beginning after the regulations were promulgated.

3. On July 19, 1980, petitioners filed this suit in the United States District Court for the Eastern District of Michigan, seeking: (1) a writ of mandamus ordering the Administrator to issue the voluntary parts certification regulations provided for in Section 207(a)(2), and maintenance instruction regulations under Section 207(c)(3);[3] (2) a declaration that the parts certification and maintenance regulations were necessary prerequisites to the promulgation of the warranty regulations; and (3) an injunction against enforcement of the warranty regulations pending issuance of parts certification and maintenance regulations. Petitioners alleged that the district court had jurisdiction under the Mandamus Act, the Declaratory Judgment Act, the Administrative Procedure Act, Section 304 of the Clean Air Act, 42 U.S.C. (Supp. III) 7604 (the citizen suit provision) and 28 U.S.C. 1331. The Administrator did not deny that the district court had jurisdiction to issue a writ of mandamus ordering the promulgation of parts certification and maintenance regulations, but urged that Section 307(b)(1), 42 U.S.C. (Supp. III) 7607(b)(1), granted exclusive jurisdiction to the United States Court of Appeals for the District of Columbia Circuit to review nationally applicable regulations such as the warranty regulations.

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[3]At the time of the district court action, the Administrator had not yet issued the parts certification regulations; he issued those regulations on November 25, 1980. 45 Fed. Reg. 78448. Contrary to petitioners' arguments, the Administrator had issued maintenance regulations prior to the district court action as part of the warranty regulations. 40 C.F.R. 85.2102, 45 Fed. Reg. 34839 (1980). These regulations included the "reasonable and necessary" requirement that had previously been mandated by Section 207(c)(3). The maintenance regulations that EPA announced were to be postponed (45 Fed. Reg. 44117 (1980)), and that petitioners refer to (Pet. 3), are *additional* maintenance regulations, which the Administrator may issue in the future.

The district court found that it had jurisdiction under each of the statutes cited by petitioners (Pet. App. 2a, 9a-10a). The district court concluded that there were no parts certification and maintenance instruction regulations (Pet. App. 4a-5a, 10a), but declined to issue the requested writ of mandamus (Pet. App. 10a-11a). Instead, disregarding Section 307(b)(1) of the Act, the district court reviewed the performance warranty regulations and issued an order containing (1) a declaratory judgment that the Administrator could not promulgate the warranty regulations in the absence of parts certification and maintenance regulations and (2) an injunction against enforcement of the warranty regulations until parts certification and maintenance regulations had been issued (Pet. App. 9a-11a).

The Administrator requested and received an emergency hearing before the court of appeals. The Sixth Circuit held that the district court lacked jurisdiction to issue either its declaratory judgment or its injunction. The court concluded (Pet. App. 17a):

> The district court reviewed the performance warranty regulations when it decided that the parts certification and maintenance regulations were necessary preceding conditions for the issuance of the performance warranty regulations. It is that review or any other review of the regulation which is barred by Section 307(b)(1).

The Sixth Circuit promptly vacated the district court's order[4] and ordered the case transferred to the United States

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[4]Petitioners' assertions that the Sixth Circuit left the district court's declaratory judgment intact (Pet. 6), and that "[r]eview of the * * * declaratory judgment is now before the Sixth Circuit" (Pet. 7 n.5), make little sense. The Sixth Circuit stated that it was vacating "[t]he district court's order" (Pet. App. 18a). The district court issued only one order. That the Sixth Circuit did not describe each portion of the order it vacated is of no consequence. *Hynning* v. *Partridge*, 359 F. 2d 271 (D.C. Cir.), cert. denied, 385 U.S. 922 (1966).

Court of Appeals for the District of Columbia Circuit (Pet. App. 13a-18a); rehearing was denied without opinion (Pet. App. 21a-22a).

On December 15, 1980, the District of Columbia Circuit transferred the case back to the Sixth Circuit, stating that it lacked jurisdiction to review a decision of any district court other than the United States District Court for the District of Columbia (Pet. App. 23a).[5]

ARGUMENT

The Sixth Circuit vacated an order that the district court had no jurisdiction to issue. The decision below is correct and does not conflict with any decision of this Court or any other court of appeals. Moreover, the question of the validity of EPA's performance warranty regulations is currently pending in the United States Court of Appeals for the District of Columbia Circuit on a petition for review filed on July 21, 1978, by some of the petitioners in this case.[6] Accordingly, review by this Court is unwarranted.

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[5]When the record of the case was received by the Sixth Circuit, its clerk "reopened the appeal" and issued a briefing schedule (Pet. App. 25a). On February 4, 1981, however, the court withdrew the briefing schedule (App., *infra*, 1a-2a).

[6]*Motor Vehicle Manufacturers Association of the United States, Inc.* v. *Costle*, No. 80-1828 (D.C. Cir.). In the petition for review, filed two days after the filing of the complaint in the district court in the instant case, the manufacturers challenged the warranty regulations, arguing that the regulations are invalid because they were promulgated in the absence of parts certification and maintenance regulations. All briefs addressing the issues raised by the manufacturers in the District of Columbia Circuit have been filed; the parties are currently awaiting the scheduling of oral argument by that court.

The relief petitioners claim is necessary to protect their interests has been available from the start in the District of Columbia Circuit. Petitioners could have moved to stay enforcement of the warranty regulations under Rule 18 of the Federal Rules of Appellate Procedure pending that court's final decision on their petition for review. *Superior*

1. Section 304(a)(2) grants a federal district court jurisdiction to compel the Administrator to perform a mandatory duty under the Clean Air Act, but does not grant a district court jurisdiction to review the validity of a nationally applicable regulation that the Administrator has already promulgated. The United States Court of Appeals for the District of Columbia Circuit has exclusive jurisdiction to review such regulations. Section 307(b)(1), 42 U.S.C. (Supp. III) 7607(b)(1). Nevertheless, petitioners argue that the district court had jurisdiction to issue its order by virtue of Section 304(a)(2) of the Act, the citizen suit provision.[7] They assert that the district court's order did not concern either the substantive or procedural validity of the warranty regulations and that the court of appeals' decision improperly restricts the relief available in Section 304(a)(2) citizen suits.

Petitioners assert that the district court's order "did not find that [the] warranty regulations are invalid" (Pet. 11), and that the order "has no effect upon the *validity* of the warranty regulations' provisions" but merely suspends their enforcement "until the Administrator has fulfilled all of his statutory nondiscretionary duties under the Act" (Pet. 11-12). The district court's order was based upon its determination that the warranty regulations were improperly promulgated because the Administrator had not previously promulgated two other sets of regulations (Pet. App. 10a).

Trucking Co. v. *United States*, 614 F. 2d 481, 484-485 (5th Cir. 1980); *Associated Securities Corp.* v. *Securities & Exchange Commission*, 283 F. 2d 773 (10th Cir. 1960); *Virginia Petroleum Jobbers Association* v. *Federal Power Commission*, 259 F. 2d 921, 925 (D.C. Cir. 1958).

[7]Petitioners do not challenge the court of appeals' ruling that the other alleged jurisdictional bases for their action in the district court were insufficient (Pet. App. 17a n.4).

Such a determination, concerning the Administrator's statutory authority to promulgate the regulations as a whole, is as much a ruling on the validity of the Administrator's action in promulgating the regulations as would be a ruling on the substance of any of the individual regulations.[8] See *Lubrizol Corp.* v. *Train*, 547 F. 2d 310, 316-318 (6th Cir. 1976); *City of Highland Park* v. *Train*, 519 F. 2d 681, 688-689 (7th Cir. 1975), cert. denied, 424 U.S. 927 (1976); *Oljato Chapter of Navajo Tribe* v. *Train*, 515 F. 2d 654, 660-661 (D.C. Cir. 1975); *Anaconda Co.* v. *Ruckelshaus*, 482 F. 2d 1301, 1304 (10th Cir. 1973); see also *Adamo Wrecking Co.* v. *United States*, 434 U.S. 275, 285 (1978).

2. This Court has ruled that district courts lack jurisdiction to review a challenge to any of the administrative actions covered by Section 307(b)(1).[9] See *Harrison* v. *PPG Industries, Inc.*, 446 U.S. 578 (1980). As the Sixth Circuit explained in analyzing Section 307(b)(1) in *Lubrizol Corp.* v. *Train, supra*, 547 F. 2d at 315:

> By centralizing appeals in the District of Columbia Circuit Court within a limited time period, Congress hoped to avoid needless delays in the implementation

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[8]The weaknesses in petitioners' argument are underscored by the consequences the district court order in this case would have had in the proceedings in the District of Columbia Circuit, if the Sixth Circuit had affirmed. Section 307(b)(1) specifically provides that a petition for review of "nationally applicable regulations promulgated * * * by the Administrator under this Act may be filed *only* in the United States Court of Appeals for the District of Columbia" (Pet. App. 37a; emphasis added). Yet, (1) the relationship between the warranty regulations and the maintenance and parts certification regulations would have already been determined; and (2) the warranty regulations would have already been held invalid. There would have been little for the District of Columbia Circuit to review.

[9]Petitioners have not argued at any stage of this litigation that the warranty regulations do not fall within the items listed in Section 307(b)(1). See also note 6, *supra*.

of important national programs caused by incessant litigation and inconsistent decisions.

Petitioners seek to create an exception to Congress' comprehensive scheme for judicial review by permitting any district court to review final administrative regulations in the context of a citizen suit. Such an exception would permit any party to frustrate Congress' attempt to establish centralized, uniform review of nationally applicable regulations (and seriously hamper the implementation of EPA's overall air program), merely by premising an attack upon a disliked regulation on the Administrator's failure to take some other action that is related to the national regulation.

Petitioners claim that because of the court of appeals' ruling "a citizen may seek only a *limited* mandamus remedy in the district court" (Pet. 16; emphasis added). The court of appeals made no such ruling.[10] Rather, the court of appeals held that, while a district court may compel an agency to perform a mandatory act in a Section 304(a) "citizen suit," a district court has no power to invalidate regulations in such an action. Contrary to petitioners argument (Pet. 16), the court of appeals did not mandate bifurcated review; it correctly followed the procedures prescribed by Congress for seeking relief concerning two entirely different matters. As the Sixth Circuit noted (Pet. App. 17a-18a):

> The district court can fully and completely grant relief for the failure of the Administrator to issue mandatory regulations pursuant to Section 207(a)(2) and Section 207(c)(3) of the Clean Air Act by ordering the Administrator to issue parts certification and maintenance instruction regulations. If it is necessary to

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[10]Section 304 itself limits the relief available in a citizen suit to an order to the Administrator "to perform such [mandatory] act or duty." The language cited by petitioners (Pet. 10) from Section 304(d) refers only to such an order.

> enjoin the enforcement of the performance warranty regulations or to consider their viability, because the performance warranty regulations are invalid without proper parts certification and maintenance regulations, then such actions must be brought pursuant to Section 307(b)(1) in the Court of Appeals for the District of Columbia. This view most appropriately effectuates the purpose of the Act. *Lubrizol Corp.* v. *Train*, 547 F. 2d 310 (6th Cir. 1976).

Petitioners complain that this statutory scheme discourages citizen suits (Pet. 16-17). If the exclusive review provision of Section 307(b)(1) "unfairly" limits the relief available in citizen suits, it is a matter for Congress to remedy by amending the Act. See *Harrison* v. *PPG Industries, Inc., supra*, 446 U.S. at 593.

3. Petitioners claim that the district court's jurisdiction to order the issuance of parts certification and maintenance regulations gave it ancillary jurisdiction to grant declaratory relief and "to issue an injunction based on such declaration and its findings of irreparable injury" (Pet. 18).[11] But this argument ignores the exclusive jurisdiction granted to the District of Columbia Circuit by Section 307(b)(1) of the Act. The district court did not merely declare that the Administrator had a mandatory duty to issue parts certification and maintenance regulations. Rather, the district court declared that the warranty regulations were unenforceable without parts certification and maintenance regulations (Pet. App. 10a). Thus, the court's declaratory judgment, rather than being the "essential equivalent of a writ of

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[11] Petitioners suggest that the court of appeals should have addressed the district court's finding of irreparable harm (Pet. 7, 11, 20-21). The court of appeals' ruling that the district court lacked jurisdiction to issue the order rendered the former powerless to pass on the merits of the case. *United States* v. *Corrick*, 298 U.S. 435, 440 (1936).

mandamus" (Pet. 17), was in reality much more[12]—an exercise of jurisdiction over a matter that Congress has committed to the *exclusive* jurisdiction of the United States Court of Appeals for the District of Columbia.[13] The doctrine of ancillary jurisdiction cannot authorize a court to exercise jurisdiction in a matter that Congress has expressly removed from its jurisdiction. In *Morrow* v. *District of Columbia*, 417 F. 2d 728 (D.C. Cir. 1969), upon which petitioners rely heavily (Pet. 19-20 & n.14), the court specifically noted this restraint upon the assertion of ancillary jurisdiction, stating that such jurisdiction may be exercised only "[i]n the absence of some specific limitation" and, accordingly, that a court must always be guided by "limits on the subject matter of which [it] may take cognizance." 417 F. 2d at 734. As noted, Section 307(b)(1) denies district courts jurisdiction to review nationally applicable regulations such as the warranty regulations.[14]

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[12]Petitioners seem to concede that the district court's order "was something more than just a practical substitute for a writ of mandamus" (Pet. 17).

[13]Petitioners' reliance (Pet. 17 n.10, 18) on *National Treasury Employees Union* v. *Nixon*, 492 F. 2d 587 (D.C. Cir. 1974), is misplaced. Nothing in that decision suggests that a court may invalidate regulations that it has no jurisdiction to review, as the district court did in this case. In *National Treasury Employees Union*, the court of appeals held that the district court had jurisdiction to issue a writ of mandamus requiring the President to take certain action, but concluded that it would be appropriate, under the circumstances, to refrain from issuing the writ.

[14]None of the cases cited by petitioners supports the assertion that a court may use ancillary jurisdiction to override a grant of exclusive jurisdiction to another court. In neither *Milliken* v. *Bradley*, 418 U.S. 717 (1974); *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971); *Brown* v. *Board of Education*, 349 U.S. 294 (1955); *Hecht Co.* v. *Bowles*, 321 U.S. 321 (1944); nor *Riggs* v. *Johnson County*, 73 U.S. (6 Wall.) 166, 168 (1867), was ancillary jurisdiction exercised or even discussed. In *Allee* v. *Medrano*, 416 U.S. 802, 811-816 (1974), this Court sustained a three-judge district court's exercise of ancillary jurisdiction to enjoin unconstitutional police conduct. But the

The Sixth Circuit properly vacated a district court order that the district court lacked jurisdiction to issue. In doing so, the court of appeals properly protected the exclusive jurisdiction which Congress has placed in the District of Columbia Circuit to review the administrative actions listed in Section 307(b)(1) of the Act. The relief petitioners claim is necessary to protect their interests has been available from the start in the District of Columbia Circuit. That petitioners chose not to seek relief there provides no reason to ignore the statutory scheme created by Congress.

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court in *Allee* had not ignored an explicit grant of *exclusive* jurisdiction to another court, as did the district court in this case.

In *Sierra Club* v. *Ruckelshaus*, 344 F. Supp. 253 (D.D.C.), aff'd per curiam, 4 E.R.C. 1815 (D.C. Cir. 1972), aff'd by an equally divided Court, 412 U.S. 541 (1973), the district court enjoined the Administrator of EPA from approving certain state air pollution control plans. See Appendix to the Petition for a Writ of Certiorari at 12a-13a, *Ruckelshaus* v. *Sierra Club*, No. 72-804, 1972 Term. The district court rejected the contention that the appropriate remedy was to seek judicial review of each approval. *Sierra Club* v. *Ruckelshaus*, *supra*, 344 F. Supp. at 254-255. Although the district court concluded that one of the agency's regulations was invalid (*id.* at 256), the court did not consider whether it had jurisdiction to enjoin enforcement of that regulation in light of 42 U.S.C. (1970 ed.) 1857h-5(b). *Sierra Club* v. *Ruckelshaus*, *supra*, therefore provides no support for petitioners in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1981

APPENDIX

UNITED STATES COURT OF APPEALS

SIXTH CIRCUIT
U.S. POST OFFICE & COURTHOUSE BUILDING
CINCINNATI, OHIO 45202

JOHN P. HEHMAN
CLERK

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February 4, 1981

Mr. David Dearing
Land and Natural Resources Division
Appellate Section
U. S. Department of Justice
Washington, D.C. 20530

Re: Case No. 80-1591/80-1604 - Motor Vehicle Manufacturers Association of the United States, Inc.; American Motors Corporation; Chrysler Corporation; Ford Motor Company; General Motors Corporation; Volkswagen of American, Inc.; Ed Bailey, Inc., d/b/a Ed Bailey AMC/Jeep, Plaintiffs-Appellees, vs. Douglas M. Costel, Administrator, United States Environmental Protection Agency, Defendant-Appellant. District Court No. 80-72618

Dear Mr. Dearing:

This letter is to advise you that the briefing schedule set in the above styled case on January 7, 1981 has been withdrawn pending further instructions from the Court.

If you have any questions in this regard, please let us hear from you.

Very truly yours,
John P. Hehman, Clerk

/s/ Yvonne Henderson
By: (Mrs.) Yvonne Henderson
Deputy Clerk

cc: Mr. Theodore Souris
Mr. Thomas Y. Au
Mr. William H. Crabtree
Mr. Kenneth I. Gluckman
Mr. Thomas P. Donohue
Mr. James M. McNee
Mr. Otis M. Smith
Mr. Gerhard P. Riechel